IP 00-0378-C H/G Grande v. Allison Engine Co.
Judge David F. Hamilton Signed on 08/03/00

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GRANDE, ROBERT J.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
ALLISON ENGINE COMPANY, INC.	)	CAUSE NO. IP00-0378-C-H/G
D/B/A ROLLS-ROYCE ALLISON,	)	
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT J. GRANDE, Plaintiff, v. ALLISON ENGINE COMPANY, ALLISON ENGINE COMPANY FLEXIBLE SPENDING ACCOUNT PLAN, and ALLISON ENGINE COMPANY RETIREE MEDICAL PROGRAM, Defendants.	)	CAUSE NO. IP 00-378-C H/G

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Robert Grande has sued his former employer and two of its employee benefit plans. Grande retired from Allison Engine Company on November 1, 1998, after 43 years of employment with Allison and its predecessors. Proceeding without a lawyer, Grande asserts two distinct claims in this case. First, he seeks to recover $628.88, which was the balance left in his flexible spending account for health care costs for calendar year 1998. Second, he seeks to receive an additional cash retirement benefit of $70 per month for himself and $70 per month for his wife for the rest of their lives. The action was tried to the court on June 16, 2000. This entry sets forth the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. As explained below, Grande prevails on the first claim but not the second.

Procedural Background

Grande originally filed this action in the Marion County Small Claims Court on February 17, 2000. The state court issued a summons setting a hearing for March 2, 2000, and that notice was served on defendant on February 18, 2000. The named defendant was Allison Engine Company.

On March 2, 2000, Allison removed this action to this court because Grande's claims arise under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq*. (ERISA). Allison filed its notice of removal in this court at 1:50 p.m. At an unknown time on March 2, 2000, the state court issued a default judgment in favor of plaintiff for $2,728.88, which was the amount of Grande's claim. Also at an unknown time on March 2, 2000, Allison filed in the state court its notice that it had filed a notice of removal in federal court.

Over its brief lifespan, this case has presented two potentially difficult procedural problems. Both have been resolved by the reasonable cooperation and agreement of the parties so as to avoid sterile and expensive procedural disputes in a case involving relatively modest stakes.

First, plaintiff Grande agreed to Allison's motion to vacate the state court's default judgment, thus avoiding a somewhat metaphysical inquiry as to whether the state court still had jurisdiction of the action at the exact moment on March 2, 2000, when it issued its judgment.

Second, Grande sued Allison Engine Company rather than the two employee benefit plans, which would be the proper defendants in a claim for benefits under ERISA. With the consent of Allison and both plans, the two plans were added as defendants on the morning of trial, and the complaint is deemed amended to name as defendants the Allison Engine Company Flexible Spending Account Plan and the Allison Engine Company Retiree Medical Program. With those issues resolved, the court turns to the merits of Grande's two claims.

I. *Flexible Spending Account Claim*

Allison established a flexible spending account plan to help employees pay for health care expenses not covered by primary health insurance coverage. Under the plan, an employee may request the employer to withhold a specified amount of money from his wages or salary during a calendar year. The money goes into an account from which the employee may be reimbursed for eligible health care expenses. Eligible expenses are those not covered by other health insurance or government programs – in other words, the employee's out-of-pocket expenses for health care. After the employee has incurred eligible expenses, he may submit a claim for reimbursement to the plan administrator, up to the limit of the funds the employee set aside in the account for that year.

Federal tax law provides the incentive to route such funds through this separate account and the extra layer of administration. The funds withheld from the employee's wages or salary are excluded from taxable income. That allows the employee to pay for health care expenses with pre-tax dollars. In return for this benefit, the employee must put up with the extra paperwork involved in administration of the

program. In addition, as a condition for the favorable tax treatment, the plan has a "use it or lose it" feature. Unused funds in an employee's account at the end of the year are forfeited to the plan. This "use it or lose it" feature gives the employee a strong incentive to estimate accurately and conservatively the eligible expenses he and his family will incur in the coming calendar year.

Only eligible expenses incurred during the relevant calendar year may be reimbursed. One elementary issue in the administration of such plans, therefore, is just when an expense is "incurred" for purposes of the plan. Defendants agree that the term "incurred" is ambiguous. It has at least three different meanings. It could refer to: (a) the time the health care is actually provided to the patient; or (b) the time the provider issues a bill; or (c) the time the bill is actually paid. There may be additional possibilities.

The facts concerning Grande's claim are straightforward. For calendar year 1995, Grande chose to have $400 set aside in his flexible spending account. For calendar year 1996, he chose to have $500 set aside, and for calendar year 1997, he chose to have $528 set aside. For 1998, Grande increased the amount of the account to $2,160. He made that election on November 6, 1997. See Ex. 7.

In October 1997, Grande's wife had received dental care that involved replacement of a tooth. The care involved expenses of more than $1,800. See Ex. 9. Grande made some payments during 1997 for that care. On January 5, 1998, Grande paid $1,262 for the care. That payment is the center of this dispute.

Grande submitted the claim for reimbursement from his 1998 flexible spending account. The plan administrator rejected the claim. The sole reason for rejecting the claim was that the expenses had been "incurred" in 1997, not in 1998, so that they could not be reimbursed from Grande's 1998 account.[1] The plan continues to adhere to that view. Grande argues that he incurred the expenses during 1998 because that is when he paid them.

Remarkably, the plan documents in the record do not answer the elementary question as to when expenses are "incurred" for purposes of the plan. Exhibit 1 is a brochure given to Grande and other participants. Under the heading "What kind of claims can I submit?," the brochure states: "Only claims for expenses incurred during Allison Engine Company's plan year may be submitted for reimbursement. Claims for the current plan year must be submitted by March 31 of the year following the plan year."

In a passage that Grande relies upon, Exhibit 1 also contains the following paragraph in answer to the same question:

> Eligible health care expenses are, in most cases, those which would qualify as deductions on your Federal Income Tax. For example, medical, dental, vision and hearing care expenses qualify as do prescription drugs. The Internal Revenue Service's Publication 502 gives a good overall presentation of which types of expenses are deductible although, in certain instances, other IRS regulations govern the eligibility of expenses for reimbursements.

Ex. 1. Grande checked IRS Publication 502, which provides information about itemized deductions for medical and dental expenses. Page 2 of the 1998 publication addresses the question: "What Expenses

[1]Grande completely used up the $528 he set aside in his flexible spending account for 1997.

Can You Include This Year?" The answer: "You can include only the medical and dental expenses *you paid this year, regardless of when the services were provided*." Ex. 19 (emphasis added). The publication explains further the timing rules for payments by check (the day the check is mailed or delivered), by a bank's "pay-by-phone" service, and by credit card.

Other plan documents in the record contain ample warnings that expenses must be "incurred" during the relevant plan year. However, none of those additional documents offer any guidance for choosing among the different meanings of "incurred." See Ex. 2 & 3. The documents also warn participants of the "use it or lose it" feature and state that forfeited plan balances at the end of the year are used to offset the expenses of plan administration.[2]

Grande's position is straightforward. The only guidance from plan documents as to when an expense is "incurred" is the reference to IRS Publication 502. Publication 502 plainly adopts a "cash" rule rather than an "accrual" rule, at least for purposes of deductions from federal income tax. Under the principles spelled out clearly in Publication 502, Grande would have been entitled to deduct the dental expenses only for the tax year in which he paid them. In light of the reference to Publication 502, at least in the absence of any clearer guidance from the plan, he could reasonably assume that the same rules would apply to his flexible spending account.

[2]The parties presented some conflicting and vague evidence at trial as to whether forfeited plan balances benefit the plan's third party administrator, the employer who created the plan, or both. The answer to that question is not material to Grande's claim.

In addition, the pattern of Grande's annual choices of amounts to deduct, the timing of his wife's dental services (principally in October 1997), and his decision to quadruple his withholding for 1998 (which he made on November 6, 1997) support the inference that Grande relied upon the reference to Publication 502 and expected that his January 1998 payment for services rendered in October 1997 would be eligible for reimbursement from his 1998 account.

The plan's position is that Treasury Regulations require the opposite answer. The plan relies on questions and answers that are published as part of *proposed* section 1.125-2 of the Treasury Regulations. See 54 Fed. Reg. 9460 (1989); amended by 62 Fed. Reg. 60196 (1997), 63 Fed. Reg. 8528 (1998), and 65 Fed. Reg. 15587 (2000). Question 7 asks broadly: "How do the rules governing the tax-favored treatment of employer-provided benefits apply to plans that are flexible spending arrangements?" Part (b) of the answer is labeled "Special requirements." Part (b)(6) finally gives an answer to the question at issue here:

> (6) Claims incurred. Medical expenses reimbursed under a health FSA [flexible spending account] must be incurred during the participant's period of coverage under the FSA. Expenses are treated as having been incurred when the participant is provided with the medical care that gives rise to the medical expenses, and not when the participant is formally billed or charged for, or pays for the medical care.

54 Fed. Reg. 9460, 9504 (1989). This brief entry appears on the 45th page of fine print of the (merely proposed) regulation, and on the 228th screen of a document that takes up 233 screens in the Westlaw format. The plan relies on this provision in the regulations to deny Grande's claim. The plan does not claim that any of the documents provided to Grande or other plan participants provide any guidance on this

question of great practical importance to them. The plan only points out feebly that the brochures such as Exhibit 1 refers generally to "other IRS regulations."

In response to the court's questions about how a participant might be expected to figure out which meaning of the ambiguous term "incurred" applies here, the plan does not suggest that participants can reasonably be expected to find their way to subpart (b)(6) of the answer to Question 7 on the 45th page of the Federal Register publication of proposed Treasury Regulation section 1.125-2. The plan suggests, however, that a participant in Grande's position could have called the plan administrator for advice. There is no evidence, however, showing that that approach would even have been likely to produce an accurate answer.

Even if the plan had been able to provide accurate information over the telephone about the contents of proposed section 1.125-2 and its questions and answers, Grande would still be entitled to relief.

The principal legal doctrine that governs here is that the written documents given to plan participants generally control the issue of benefits. See, *e.g.*, *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465-66 (7th Cir. 1998) (comparing ERISA law and contract law, and explaining that plan summary generally controls in case of conflict with plan itself). The record here does not contain detailed plan documents, so the court bases its decision on the documents in the record that were given to participants. Those documents do not answer the critical question. As a general rule in ERISA cases, ambiguities are interpreted in favor of the beneficiary. See, *e.g.*, *Phillips v. Lincoln National Life Ins. Co.*, 978 F.2d 302, 308-14 (7th Cir. 1992). Courts must interpret the terms of an ERISA policy in an ordinary and

popular sense as would a person of average intelligence and experience. *Id*. at 308, citing *Hammond v. Fidelity & Guaranty Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992); accord, *McNeilly v. Bankers United Life Assur. Co*., 999 F.2d 1199, 1201 (7th Cir.1993).

There is no claim here that the plan documents give the plan administrator discretion to interpret ambiguous terms in the plan. Cf. *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331-32 (7th Cir. 2000) (holding that grant of discretion must be explicit).

With a flexible spending account plan, the reasons to interpret ambiguities in favor of the participant are as powerful as one could expect to find. Grande is not seeking an insurance benefit. He is seeking the return of his own money! He has already paid for the dental care himself. All he seeks here is the money left in his own account, withheld from his own paychecks. He is entitled to that money here because the plan documents in the record do not impose the limited meaning of "incurred" argued by the plan.

Grande is entitled to the money for another independent reason – estoppel. Estoppel is of course difficult to establish in ERISA cases. See *Sandstrom v. Cultor Food Science, Inc*., 214 F.3d 795, 797 (7th Cir. 2000) ("Likewise, statements or conduct by bureaucrats implementing a plan do not estop the employer to enforce the plan's written terms, and although we have not barred the door we have made it clear that only extreme circumstances (not yet seen) justify estoppel."). Flexible spending accounts provide as compelling a case for estoppel as can be imagined. This is not a case involving an attempt to expand coverage based on oral modifications that might threaten the solvency of a plan, which is the most powerful rationale for limiting estoppel in the ERISA context. See, *e.g.*, *Mathews*, 144 F.3d at 465. Again, this case is about Grande's own money. He simply wants it back. He is not seeking to have the plan pay for

care that is not covered. He just wants to be able to use all the funds that he earned and that he chose to set aside in his account, based on the (inadequate) information and assurances provided by the plan.

The sequence of events here – Grande chose how much he wanted deducted from his paycheck for the plan after his wife had already received the care in question – certainly raises the prospect of potential manipulation by a plan participant. Because Grande already knew he and his wife would be paying significant health care expenses, his election for 1998 did not involve the degree of uncertainty that the IRS (proposed) regulations provide should be required for the participant. With documents as ambiguous as those in this record, however, there is also potential for manipulation by a plan administrator, who fails to provide clear guidance to participants on an important practical issue, and who then hangs on to money paid into the plan by a participant who reasonably relied on the information that was provided. In short, the response to any concern about possible manipulation is for plan administrators to provide clear guidance on this elementary practical issue.

II. *Retirement Medical Benefits*

Grande's second claim is against the Allison Engine Company Retiree Medical Program. After a retiree is eligible for Medicare benefits, the company's plan anticipates that Medicare will provide primary health insurance coverage. The company's plan also provides a subsidy for so-called "Medigap" coverage. The record does not contain detailed plan documents. Again the court addresses only those documents in the record, which consist of brochures provided to Grande and other retirees.

One brochure stated:

> The Company will provide a subsidy to you and your spouse if you are married to assist in the purchase of private medigap insurance, or to pay premiums in the Medicare Choice plans being established around the country. The subsidy in today's dollars is $70 per month per person, or $140 per month per couple. This amount is reviewed periodically.

Ex. 13.

Another brochure stated: "The Company provides a $70 monthly subsidy for you and $70 for your spouse to purchase a supplemental insurance policy to cover expenses not covered by Medicare. The amount and structure of this subsidy will be evaluated annually to determine the need for modification." Ex. 14. The same brochure states: "The Company will provide a special subsidy designed to help you purchase a "Medigap" plan, a supplemental insurance plan designed to help pay for medical expenses not covered by Medicare." In a portion entitled "How the Subsidy Works," the brochure states further:

> When you become eligible for Medicare, the Company will provide you and your spouse with a $70 monthly subsidy each. The subsidy is designed to be sufficient to purchase a medium-priced supplemental Medicare insurance plan; prices were based on the estimated cost in 1998 of Medigap plans offered by the AARP Prudential in Indiana. Allison's Board of Directors will review the amount and structure of this benefit each year to determine if modifications are necessary due to factors including inflation, legislative changes, or changes in the marketplace.

Ex. 14.

Grande contends the $70 per person per month subsidy is not subject to any restrictions. He contends that he and his wife are entitled to receive that additional cash to use as they wish. The plan

denied his request for payment of this amount because he had not shown that he had purchased the kind of insurance plan that would be covered. Allison's benefits administrator described the benefit in a January 28, 1999, letter to Grande describing the whole array of retirement benefits: "To participate in the Medicare Reimbursement Supplement Insurance program, reimbursements from the plan are restricted to Medi-gap or Medi-care choice premiums only. Reimbursement for deductibles, co-pays, co-insurance, or employee contributions from other employer plans are not eligible expenses to participate in the plan." Ex. 15.

The brochures provided to Grande do not say in so many words that the subsidy is available only to reimburse payments the retiree actually has made for a Medigap insurance policy. The brochures also do not state specifically that the retiree must enroll in the plan or must submit proof of payments for an eligible policy.

Nevertheless, the documents in this record cannot reasonably be interpreted as providing an *unrestricted* $70 per person per month addition to Grande's regular retirement benefits. The repeated references to a subsidy for Medigap insurance policies clearly indicate the benefit is not merely an unrestricted addition or gift, but is instead intended for a specific purpose.

Grande apparently does not need a Medigap policy because of benefits available to him under a benefit program dating from the years when he was employed be General Motors Corporation, which previously owned the Allison facility where Grande worked. The record is not entirely clear on this point,

but Grande apparently wants to use the "subsidy" to pay his share of expenses under that plan. He believes it is not fair for the program to be limited as it is.

Fair or not, however, an employer who establishes a plan is free to impose limitations such as this. Allison could decide to subsidize some kinds of supplemental health insurance coverage but not others. Although the documents in this record do not spell out the limits as clearly as they might, they show with sufficient clarity that Grande is not entitled to that additional benefit because he has not purchased the type of health insurance policy covered by the plan.

Conclusion

For the reasons set forth above, the court will enter judgment in favor of Grande and against the Allison Engine Company Flexible Spending Account Plan for the sum of $628.88, and will dismiss Grande's other claims with prejudice. In light of the mixed results, each party shall bear his or its own costs.

Date: August 4, 2000

DAVID F. HAMILTON, JUDGE
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